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SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

January Term, 1959

No. 872

NORTH CENTRAL AIRLINES, INC., *Petitioner*

v.

CIVIL AERONAUTICS BOARD, *Respondent*
LAKE CENTRAL AIRLINES, INC., *Intervenor*
LAKE CENTRAL EMPLOYEE STOCKHOLDER GROUP, *Intervenor*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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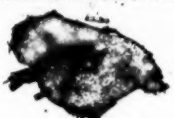

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States.

Petitioner, the appellant below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above cause on January 29, 1959.

OPINIONS BELOW

The Civil Aeronautics Board entered an opinion in the case of *North Central Airlines' Acquisition of Lake Central Airlines*, Docket No. 5770, Order No. E-11548, on July 9, 1957 (J.A. 480) and denied North Central's petition for reconsideration in Docket No. 5770 by Order No. E-11932, entered November 1, 1957 (J.A. 558). The opin-

ion of the United States Court of Appeals for the District of Columbia Circuit is set forth in Appendix B to this Brief.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on January 29, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Did the Civil Aeronautics Board have the power to convert an acquisition proceeding under Section 408 of the Civil Aeronautics Act of 1938 into a competitive hearing by inviting and permitting the intervention of prospective buyers of the Lake Central stock other than North Central, and by permitting the intervention of the Lake Central Employee Stockholder Group, thereby distorting and changing the statutory test of *whether the acquisition was not consistent with the public interest* to *which of several alternatives for the operation of Lake Central was, in the discretion of the Civil Aeronautics Board, preferable?*

2. Did the Civil Aeronautics Board improperly deprive North Central of its right to a full and fair hearing under the Fifth Amendment of the Constitution, the Administrative Procedure Act, the Civil Aeronautics Act of 1938, and the Rules and Regulations of the Board by holding individual *ex parte* conferences with representaatives of the Lake Central Employee Stockholder Group concerning matters pertinent to the acquisition of the Lake Central stock by North Central?

3. Did the Court below improperly sanction a departure from the doctrine announced by this Court in *Ashbacker Radio Corporation* v. *FCC*, 326 U.S. 327, 66 S.Ct.

148 (1945) and deprive North Central of a full and fair hearing when it failed to hold that the Civil Aeronautics Board had erred in permitting without notice to North Central the amendment of the Lake Central Voting Trust Agreement so as to allow the transfer of the voting trust certificates to the Lake Central Employee Stockholder Group, thereby placing North Central in the position of having to displace an established licensee instead of merely having to take over the operation of the airline from an unfit management?

4. Did the Court below improperly sanction an unexplained departure by the Civil Aeronautics Board from its established precedents concerning acquisition and merger cases?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS OF THE CIVIL AERONAUTICS BOARD INVOLVED

The consideration of this case involves Amendment Number V to the Constitution of the United States, portions of the Administrative Procedure Act [5 U.S.C. 1001 et seq.], the Civil Aeronautics Act of 1938 [49 U.S.C. 401 et seq.], and portions of the Economic Regulations of the Civil Aeronautics Board. The pertinent sections of these documents are set forth fully in Appendix A to this petition.

STATEMENT OF THE CASE

Petitioner, North Central Airlines, Inc., is a Wisconsin corporation engaged in the business of scheduled interstate air transportation of persons, property and mail pursuant to a certificate of public convenience and necessity issued by the Civil Aeronautics Board. Lake Central Airlines, Inc. is a Delaware corporation also engaged in the scheduled interstate air transportation of persons, property and mail under a certificate of pub-

lic convenience and necessity. Petitioner is one of the largest, lowest cost and least subsidized local service operators. On the other hand, Lake Central Airlines is one of the smallest, highest cost and most subsidized local service operators.

Petitioner initiated the proceedings below when it sought the approval of the Civil Aeronautics Board under Section 408 of the Civil Aeronautics Act of 1938 of a contract to purchase approximately 96 percent of the Lake Central stock from John V. Weesner, Roscoe Weesner, William W. Weesner and various corporations controlled by them (Rec. 43, 54, 60). The acquisition contract of which North Central sought approval grew out of the *Reopened Indiana-Ohio Local Service Case*, 16 CAB 880 (1953) which the Board reopened in order to investigate alleged improper, illegal and dishonest practices in the field of air commerce by the Weesners and their associates and their effect upon the fitness, willingness and ability of Lake Central Airlines to engage in scheduled air transportation. The hearing examiner in that case found that there had been serious violations of the Civil Aeronautics Act by John Weesner, Lloyd Hartman, the present executive vice president of Lake Central, and several other Weesner associates (Exam. I.D., CAB Docket No. 4034, pp. 20 and 43).[1] He recommended that Weesner divest himself of the management and control of Lake Central. Before the Board had acted on the

[1] Similarly, the examiner in North Central's acquisition case found more recent dishonest and illegal practices by the Lake Central management which involved this same Lloyd Hartman (Rec. 450 and 451). He was amazed at their alacrity in: (1) raising the salaries of the employees to allow them to pay for their stock; (2) binding the airline to pay for the Weesners' legal fees; (3) indemnifying Dr. Robert Stewart, a member of the Lake Central board of directors, for loss arising out of a suit against him by North Central for breach of fiduciary relationship; (4) defraying their expenses incurred in opposing the acquisition with company funds; and (5) managing Lake Central for their personal ends rather than for the public interest.

examiner's recommendations. Weesner attempted to sell his interest in Lake Central in order to salvage his investment. See *Hartman* v. *North Central Airlines, Inc.*, 241 F.2d 859 (7th Cir. 1957). On September 15, 1952, North Central offered to purchase the stock from the Weesners and a written contract was entered into on September 17, 1952 (Rec. 46).[2] Subsequently, on October 17, 1952, the Civil Aeronautics Board upheld their trial examiner in the *Reopened Indiana-Ohio Local Service Case, supra*, at 944, and found that the Weesners were unfit to engage in air transportation and that they must divest themselves of control of Lake Central. Solely on the basis of North Central's contract and the financial fitness which North Central gave to Lake Central, the Board granted Lake Central a 30 day extension. During this period, the Weesners were to promulgate and present to the Board a plan for divestment of their stock. For this purpose, the Weesners proposed and the Civil Aeronautics Board approved a Voting Trust Agreement.[3] Petitioner requested Board approval under Section 408 of the Civil Aeronautics Act of its contract by applications dated September 30 and November 1, 1952 (Docket No. 5770)[4] and for approval of interlocking relationships under Section 409 of the Civil Aeronautics Act on March 18, 1953 (Docket No. 6024).[5] Ozark Airlines and Trans-

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[2] This contract was amended by a subsequent written contract of October 17, 1952 (Rec. 54).

[3] Thereafter, in spite of their contract with North Central, the Weesners attempted to resell their interest in Lake Central, now in the form of voting trust certificates, to Ozark Airlines, Roscoe Turner and others. *Hartman* v. *North Central Airlines, Inc.*, *supra*. In doing so, the Weesners were violating a provision in their contract with North Central by which they agreed to fully cooperate with North Central in the prosecution of an application for approval of the acquisition (Rec. 49).

[4] Rec. 43-46, 54.

[5] Rec. 6-11.

port Air Group requested consolidation into Docket No. 5770 of their applications to be considered as potential transferees of Lake Central. At the prehearing conference in Docket No. 5770, North Central objected to the consolidation of applications of other potential purchasers and requested that the issues in this case be restricted to the consideration of its acquisition agreement (Orig. Tr. 230). North Central's objections were formalized in its answers to the motions of Ozark and Transport Air Group for consolidation (Orig. Tr. 259). The Board, however, converted North Central's acquisition proceeding into a competitive proceeding when it instituted an investigation ". . . to determine whether and upon what terms the acquisition of the majority stockholding interest in Lake Central by North Central, Ozark and/or Air Group, and whether and upon what terms the acquisition of Lake Central's Route No. 88, in whole or in part, by North Central, Ozark and/or Air Group is consistent with the public interest . . ." and consolidated this investigation with Docket No. 5770 (Orig. Tr. 301).[6]

Finally, on June 25, 1954, the Weesners succeeded in contracting to resell the same stock, now in the form of voting trust certificates, that they had previously contracted to sell North Central. They entered an option contract to sell their voting trust certificates to Lloyd Hartman and Robert Clifford.[7] Hartman and Clifford

[6] The Board further manifested its desire that the acquisition proceeding be a competitive one when it permitted the intervention in 1954 of the Lake Central Employee Stockholder Group (Orig. Tr. 484) over North Central's bitter protest.

[7] Lloyd Hartman was one of the associates of the Weesners who had been censured in the *Reopened Indiana-Ohio Local Service Case, supra*. So far as Hartman and Clifford were concerned, it was a windfall as they took the Weesners' certificates subject to any North Central rights. If the value of the stock were to depreciate, they would not oppose the acquisition by North Central and permit North Central to bear the loss. If the value appreciated, they would (a) claim that North Central had breached its

later sold a part of the certificates to some of the employees of Lake Central and thereafter labeled their group for conspicuous consumption purposes as the Lake Central Employees Stockholder Group.

During the latter part of May or the first part of June in 1954, Hartman and Clifford and other representatives of the Employee Stockholder Group proceeded with a diabolical scheme to capture Lake Central for themselves and held informal *ex parte* conferences with individual Board members. The matters which were discussed were whether there would be any official objection to their going forward with the stock purchase program and whether Lake Central should be operated as a separate entity or merged or dismembered (Orig. Tr. 1985, 364, Appendix C). The result of these conferences was the consummation of the option voting trust purchase contract between the Weesners and Hartman and Clifford entered into on the 25th of June, 1954 (Rec. 202).

Now that they had both feet in the door, the Employee Stockholders openly and actively opposed the acquisition. They petitioned the Board for leave to intervene in Docket No. 5770 (Orig. Tr. 149). The Board allowed the intervention of the Employee Stockholder Group (Orig. Tr. 430), thereby further manifesting its intention that the North Central acquisition proceeding be a competitive one. This permitted the Weesners' assignees, the Lake Central Employee Stockholder Group, whose assignment was specifically made subject to the rights of North Central, which included the right to have the sellers' cooperation in obtaining approval of the acquisition, to violate the sellers' contractual commitments and vigorously oppose approval.

The Employee Stockholders instigated as amendment to the Voting Trust Agreement to allow them to pur-

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contract and had no rights and (b) oppose the acquisition before the Board and, if successful in either case, "steal" the benefits of North Central's contract.

chase the voting trust certificates without terminating the trust.[8] On January 11, 1955, the Employee Stockholders filed a formal application for approval of this amendment in Docket No. 4034, the *Reopened Indiana-Ohio Local Service Case, supra*. No notice was given to North Central of this application by either the Lake Central Employee Stockholder Group or the Civil Aeronautics Board. By chance North Central received word of this application and objected strenuously to the amendment of the Voting Trust Agreement (Orig. Tr. 443, 453, 463). The Board granted the Lake Central Employee Stockholder's request over the objections of North Central in Docket No. 4034, Order No. E-8931, thereby making it possible for the Employees to exercise their option and purchase the voting trust certificates.[9]

In 1955, the Board severed from Dockets 5570 and 6024 upon request of both North Central and Lake Central all applications of prospective purchasers other than the Lake Central Employee Stockholders, and the case proceeded to hearing in November 1955. After hearing, the examiner found that the acquisition would not be inconsistent with the public interest, and recommended its approval (Rec. 441-467). The Board reversed its examiner, however, and refused to approve North Central's acquisition contract on the principal grounds that the North Central and Lake Central trade areas are not "complementary" and that the combined systems would

[8] The original Voting Trust Agreement provided that a transfer of more than 75 percent of the voting trust certificates would terminate it. The Employee Stockholders sought amendment of the agreement so as to eliminate this provision.

[9] Hartman and Clifford did not confine their efforts to pre-empt the North Central contract to proceedings before the Board. They filed a suit in the U. S. District Court for the Southern District of Indiana to have the contract declared breached by North Central all pursuant to the above-stated scheme. This attempt failed when the U. S. Court of Appeals for the Seventh Circuit found that the contract had not been breached (*Hartman* v. *North Central Airlines, Inc., supra*).

create a local service carrier of "unprecedented size." The Board's action in considering each of these findings as ground for denial of approval constituted clear departures from the Board's own prior decisions. In the *Arizona-Monarch Merger Case*, 11 CAB 246 (1950), the Board specifically held that ". . . it is not essential that the routes of the two companies be complementary . . ." in an acquisition or merger proceeding; and in the *West Coast-Empire Case*, 15 CAB 971 (1952), it was necessary for the Board to certificate a new segment to close a hiatus between the route systems of the merging carriers. Furthermore, the Board departed from its findings in other acquisition and merger cases that size of the combined carriers is not *per se* a consideration in the determination of inconsistency with the public interest. North Central petitioned for reconsideration of the Board's order (Rec. 519). After denial of reconsideration, North Central petitioned for judicial review in the U. S. Court of Appeals for the District Circuit.

Briefs were submitted to the Court of Appeals and oral argument held. Subsequently, the Court requested supplemental briefs by the parties on four questions involving procedural improprieties on the Board's part, which would vitiate the administrative proceedings in this case (Rec. 568). On January 29, 1959, the Court of Appeals issued its decision and opinion in this case affirming the decision of the Civil Aeronautics Board (Rec. 561-566). In its opinion, the Court dismissed the questions requested on supplemental briefs by merely saying (Rec. 565):

> "With the assistance of supplemental memoranda from counsel for the parties, the Court has explored several questions relating to the procedure before the Board, but we find no reversible error in these respects."

The Court also condoned the Board's unexplained departures from its precedents and attempted to explain

them by attributing them to a valid exercise of administrative discretion (Rec. 516). Its reasoning with respect to this point was vague, inconsistent and indecisive. Petitioners respectfully request that a writ of certiorari issue to review the erroneous decision of the Court below.

REASONS FOR GRANTING THE WRIT

A. The Board Did Not Have the Power to Invite and Permit the Intervention of Other Prospective Purchasers for the Lake Central Stock and to Thus Convert the Acquisition Proceeding into a Competitive Hearing.

The very nature of a merger or acquisition proceeding under Section 408(b) of the Civil Aeronautics Act is non-competitive.[10] Such a proceeding differs from a Section 401 route certification case in that it can only arise out of an agreement between separate entities, whereas route cases are born of disagreement as to which or how many carriers should operate a given route. There is no express statutory authority whatever for converting a 408 hearing into a competitive proceeding. To the contrary, Section 408(b) refers repeatedly to "the" acquisition of control and "such" acquisition of control, ob-

[10] Section 408(b) of the Civil Aeronautics Act of 1938 defines the power of the Board in acquisition cases as follows:

"(b) Any persons seeking approval of . . . acquisition of control specified in subsection (a) of this section shall present an application to the Authority [Board] and thereupon the Authority [Board] shall notify the persons involved in the . . . acquisition of control and other persons known to have a substantial interest in the proceeding of the time and place of a public hearing. Unless after such hearing the Authority [Board] finds that . . . acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order approve such . . . acquisition of control upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe."

viously meaning "the" acquisition contract entered into between the acquiring and the acquired airline. The Board's power in acquisition cases under Section 408 is negative. It can act only if one of the carriers applies for approval of an acquisition *agreement*. Certainly the Board cannot institute acquisition proceedings of its own or force unwilling carriers into a merger, and it is obliged to respect contractual agreements unless they are not consistent with the public interest. Such a power would have the effect of forcing either an unwilling buyer or an unwilling seller to consent to the acquisition. Logically, therefore, the Board is limited to the consideration of that agreement of which approval is requested.

One of the things considered to be in public interest under Section 2(b) of the Civil Aeronautics Act is the fostering of sound economic conditions in air transportation. Mergers and acquisitions are methods of effecting this consideration. Undoubtedly, it was the intention of Congress in passing Section 408 to favor strengthening of weak carriers through mergers and acquisitions.[21] For this reason, Congress made an acquisition inferentially in the public interest by requiring that the Board approve the acquisition unless it finds that it will not be consistent with the public interest. If the decisions of the Civil Aeronautics Board and the Court of Appeals are allowed to stand, the Congressional intent will be thwarted. Carriers will be reluctant to enter into

[21] The Executive Branch of the Government and the Civil Aeronautics Board have given effect to this policy in favor of mergers and acquisitions. See Statement of Policy respecting Economic Program of 1949 issued Feb. 26, 1949; Annual Report of the Civil Aeronautics Board, 1950, p. 2; *Eastern-Colonial Acquisition of Assets*, Docket No. 5666, Order No. E-8446, dated June 17, 1954, Appendix 1, p. 1; *Flying Tigers-Slick Merger Case*, 18 CAB 326 (1954); *Continental-Pioneer Acquisition Case*, Docket No. 6457, Order No. E-8803, dated Dec. 7, 1954, p. 3; President's Air Coordinating Committee Report on Civil Air Policy, May 1954, p. 14.

merger and acquisition agreements and to institute the expensive, involved, time-consuming procedures necessary to obtain Board approval if they know in advance that the Board will prolong the proceedings and make them even more hazardous and expensive by inviting to participate their competitors who have absolutely no interest in the original agreement and no contractual exposure. This is particularly true in view of the fact that in a competitive hearing each party theoretically has equal opportunity, whereas in an acquisition proceeding the acquiring airline has contracted for its position and exposed itself to the economic risk. The Civil Aeronautics Board should not be permitted to transcend North Central's constitutional rights under the Fifth Amendment by violating the sanctity of its contract.[12] Such a violation results from both enlarging the limited condition which the statute places upon contracts of acquisition, and from permitting the assignee of the seller to formally and officially violate its contractual commitment to cooperate in obtaining approval by allowing such assignee to pose the most obstreperous opposition to approval.

A consideration of this question by this Court is of extreme importance not only as a guide to the Civil Aeronautics Board in future proceedings before it but also as a guide to other administrative agencies. This is the first time that the Civil Aeronautics Board has openly and flagrantly converted a basic Section 408 proceeding into a competitive one. This Court now has the opportunity to clarify for the Civil Aeronautics Board and the air industry the extent of the Board's authority in the field of mergers and acquisitions. A decision on this point will be a guide for future acquiring and merging carriers in determining whether or not they should enter into such agreements. A decision denying certiorari and

[12] *See Lynch* v. *U. S.*, 292 U.S. 571, 579 (1934).

thereby affirming the Court below and the Civil Aeronautics Board will suppress the desire of air carriers to enter agreements even though they may be in the public interest. This is particularly important in our maturing air transportation system which is constantly attempting to increase efficiency through every means possible, including acquisition and merger. The ultimate effect would be the suppression of the development of the most efficient type of national air transportation system.

B. The Board's Action in Holding Individual *Ex Parte* Conferences with Members of the Lake Central Employee Stockholder Group was an Improper Departure from the Usual Course of Administrative Proceeding, a Departure from this Court's Decisions, and a Violation of North Central's Rights to a Full and Fair Hearing.

The record in this case shows that members of the Lake Central Employee Stockholder Group held individual *ex parte* conferences with Board members prior to entering into an option contract to purchase the Lake Central voting trust certificates (Orig. Rec. 364, 1985, Appendix C). The matters discussed at these conferences were whether or not there was any official objection to the Lake Central Employee Stockholders going forward with their option contract and whether such a program might well be considered as an answer to the question of whether Lake Central should be operated as a separate entity or merged or dismembered. At the very least, these conferences involved a discussion as to the merits of the Lake Central Employee Stockholders' contention that they had an interest in the acquisition case which would allow them to intervene. North Central should have been afforded an opportunity to appear and oppose the Lake Central Employee Stockholders' contention of interest. No such opportunity was afforded North

Central and therefore it was deprived of a full and fair hearing.

Ex parte conferences in judicial tribunals are improper, amounting to reversible error. E.g., *Root Refining Co.* v. *Universal Oil Products Co.*, 169 F.2d 514, 534-535, 540-541 (3d Cir., 1958). Members of administrative agencies are expected to conduct themselves with the same honor and dignity as members of a judicial tribunal. Section 300.1 of the Board's Economic Regulations requires that the Board members and its staff conduct themselves with the same fidelity to standards of propriety that characterize a court and its staff. Section 300.2 of these same Economic Regulations specifically condemns the practice of holding *ex parte* conferences between Board members and other interested persons or parties (Appendix A).

This Court has held that the practice of holding *ex parte* conferences in administrative proceedings is improper. *Morgan, et al.* v. *U. S., et al.*, 304 U.S. 1, 58 S.Ct. 773 (1938). There, Mr. Chief Justice Hughes, speaking for the majority, in a much-quoted opinion, said, 304 U.S. at 19:

> "Congress, in requiring a 'full hearing' had regard to judicial standards not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature. If in an equity cause the special master or the trial judge permitted the plaintiff's attorney to formulate the findings upon the evidence, conferred *ex parte* with the plaintiff's attorney regarding them, and then adopted his proposals without affording an opportunity to his opponent to know their contents and present objections, there would be no hesitation in setting aside the report or decree as having been made without a fair hearing."

The U. S. Court of Appeals for the District of Columbia, in affirming the decision of the Civil Aeronautics Board,

sanctioned the improper *ex parte* conferences of the Board and therefore neglected its responsibility of strictly enforcing the requirement of a full and fair administrative hearing. Such a requirement should be even more strictly enforced against an administrative agency than against the Courts since the administrative tribunal has such broad discretionary power. *Ohio Bell Telephone Company* v. *Public Utilities Commission*, 301 U.S. 292, 304 (1937).

We ask that the Supreme Court use its supervisory powers to remedy the basic impropriety and injustice perpetrated by the Civil Aeronautics Board and sanctioned by the U. S. Court of Appeals in permitting these *ex parte conferences*. This is the same type of thing which prompted this same lower Court to remand another case, *WKAT* v. *FCC*, 258 F.2d 418 (D.C. Cir. 1958), to the Federal Communications Commission for a determination as to whether the parties were prejudiced by similar *ex parte* conferences with a Commission member. The Supreme Court recently granted certiorari in the case of *WORZ, Inc.* v. *FCC*, 79 S.Ct. 114 (1958), and remanded it to the Court of Appeals for appropriate action. The *WORZ Case* also involved *ex parte* conferences at the Commission level. Petitioner submits that unless decisions containing this kind of practice are reversed and remanded, the administrative process will be continually eroded and ultimately destroyed. This Honorable Court should review such cases and clearly establish the proposition that *ex parte* hearings will vitiate an administrative order to the extent that if presented to this Court, it will review and reverse such cases. Such a holding will have a salutory effect on the administrative process and administrative justice. This large and ever-growing field of law should be given the guidance and strength necessary to assure the continued public confidence and support which is necessary for its ultimate survival.

C. The Civil Aeronautics Board's Action in Permitting the Amendment of the Lake Central Voting Trust Agreement without Notice to North Central Deprived North Central of a Full and Fair Hearing under the Fifth Amendment to the Constitution by Departing from the Prior Decisions of the Supreme Court.

In *Ashbacker Radio Corporation* v. *FCC*, *supra*, the Supreme Court held that it is improper for an administrative agency to jeopardize the substantial rights of an interested party where there are mutually exclusive applications by placing that party in the position of having to displace an established licensee. Mr. Justice Douglas, in that case, stated (326 U.S. at 332):

> "As the Fetzer application has been granted, petitioner, therefore, is presently in the same position as a newcomer who seeks to displace an established broadcaster. By the grant of the Fetzer Application petitioner has been placed under a greater burden than if its hearing had been earlier. Legal theory is one thing but the practionalities are different for we are told how difficult it is for a newcomer to make a comparative showing necessary to displace an established licensee."

The Court went on to say (326 U.S. at 334):

> "While the statutory right of petitioner to a hearing on its application has in form been preserved, it has, as a practical matter, been substantially nullified by the grant of the Fetzer application."

By allowing the Lake Central Employee Stockholder Group to acquire the Weesners' voting trust certificates, the Board has, as a practical matter, prejudged the North Central-Lake Central Acquisition Case. It placed control of the Lake Central stock in the hands of a party which was acceptable to it, whereas the Wessners had not been acceptable. The issues of the acquisition case were, therefore, changed from *whether the acquisition*

was inconsistent with the public interest to *whether North Central control and operation would be preferable, in the discretion of the Civil Aeronautics Board, to control and operation by the Lake Central Employee Stockholders.* North Central was given the added burden of displacing an established management and ownership which was far superior to that of the Weesners. This was the very evil that the Supreme Court in the *Ashbacker Case, supra,* intended to remedy.

The hierarchy of interests in this case was reversed. Up until this time, North Central had the primary and dominant interest in Lake Central by virtue of its contract with the Weesners. The Lake Central Employee Stockholders had only a "possibility of reverter" standing in the shoes of the Weesners who had contracted to sell to North Central, subject to Civil Aeronautics Board approval, and who had agreed to cooperate in obtaining approval by the Board. The Board made it possible for the Employee Stockholders to become firmly entrenched as "employee owners." North Central was relegated to the secondary position of having to wrench control from the management and some of the employees of Lake Central. This was a much more serious and difficult burden. Moreover, North Central was presented with the anomalous situation where the Lake Central Employees Stockholders were permitted to, and actually did, use the assets of Lake Central to prevent North Central from obtaining those assets (Rec. 144, 168, 180, 450). A review of the Board's action in these respects by the Supreme Court and of the action of the U. S. Court of Appeals in sanctioning such improper actions is the only way in which North Central's constitutional right to a full and fair hearing will be protected. It has now been 14 years since the *Ashbacker* decision was rendered. The evil principle previously condemned is again presented in a slightly different posture. Further guidance by this Court is required if justice is to be done.

D. The U. S. Court of Appeals for the District of Columbia Circuit Improperly Sanctioned an Unexplained Departure by the Civil Aeronautics Board from its Prior Norms Concerning Acquisition and Merger Cases.

The requirements of justice and fair play in administrative proceedings demand that an administrative agency act with a degree of consistency. An agency is acting arbitrarily when it adopts different standards for similar situations. *NLRB* v. *Mall Tool Co.*, 119 F.2d 700 (7th Cir. 1941). An unexplained departure from its prior norms by the Civil Aeronautics Board makes its findings insufficient and thereby precludes the appellate court from fulfilling its statutory obligation to ". . . hold unlawful and set aside agency actions, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." Administrative Procedure Act § 10(e) [5 U.S.C. § 1009]. In the case of *Secretary of Agriculture* v. *U.S., et al.*, 347 U.S. 645; 74 S.Ct. 826 (1954), Mr. Justice Frankfurter, in writing the majority opinion, said:

> ". . . While the Commission has adumbrated the reasons that commended these charges to its approval, the Commission has not adequately explained its departure from prior norms . . .
>
> "We do not know whether the Commission has regarded its own findings . . . or whether in order to meet an unusual situation, the Commission has modified the normal doctrine . . ."

If the Civil Aeronautics Board has reached its decision by applying an arbitrary double standard certainly it should be reversed. If it has not given sufficient reasons for its departure from established rules and precedents, its findings are insufficient to allow the courts to properly review them and the case should be remanded for further findings.

In this case, the Civil Aeronautics Board gave two basic reasons for its refusal to approve North Central's acqui-

sition contract. It held: (1) that the North Central and Lake Central areas are ". . . not complementary trade areas. . ." (Rec. 481) and (2) that a merger of the North Central and Lake Central routes would ". . . create a local service system of unprecedented size engendering a tendency on the part of the carrier to concentrate unduly on the long haul traffic . . ." It can be demonstrated that these findings are not only at odds with established Civil Aeronautics Board precedents, holding that neither of them constitute reasons for denial of approval of an acquisition contract, but that they are so much at odds with each other as to constitute an arbitrary and capricious determination.

In the *Arizona-Monarch Merger Case, supra*, the Board held that, "It is not essential that the routes of two companies be complementary." After specifically denying the importance of complementary routes in the *Arizona-Monarch Case, supra*, the Board went on to discuss the important element in a merger or acquisition case. It said:

> "We are of the opinion that the only real issue presented with respect to the question of integration is that which relates to the *economies which would be achieved through the joint use of facilities, equipment and personnel.*" (emphasis supplied.)

The *Arizona-Monarch Case, supra*, was followed by the *West Coast-Empire Case, supra*, where the acquisition was approved. In that case the two carriers' routes did not touch and required certification of several hundred miles of new routes to obtain some possible future traffic integration.

North Central devoted a great deal of time and evidence in this proceeding to showing that there would be economic integration between the two carriers. The Board acknowledged such economic integration and the substantial savings in government subsidies which would re-

sult (Rec. 491), but then ignored this economic integration and decided the case on a question which it had determined to be unimportant in the *Arizona-Monarch Case*, that of whether the route systems or areas of the two carriers are complementary. The Board does not explain its inconsistency. If there is a good reason for this departure from the decision in the *Arizona-Monarch Case* and the *West Coast-Empire Case*, the Board should have set it forth in its opinion. If there is no good reason, the decision is arbitrary and should be reversed.

Furthermore, the Board's findings that the size of the combined North Central and Lake Central systems would militate against the approval of the acquisition is opposed to its prior decisions in favor of increased size where it results in more economical and lower cost operations. *Mississippi Valley Case*, 8 CAB 726, 752 (1947); *Texas-Oklahoma Case*, 7 CAB 481, 537 (1946). In the *Monarch-Challenger Merger Case*, 11 CAB 33 (1949), the Board said:

> "We do not share the concern of these carriers that the increase in size of a feeder carrier *per se* endangers their operation. We have constantly endeavored to avoid establishing competition between trunkline carriers and we see no reason for abandoning that policy. Hence we are not impressed with the argument that the increase in size of the feeder company represents a danger to the so-called regional trunkline operators."

Despite these precedents, the Board in this case found that the acquisition by North Central would be inconsistent with the public interest because it ". . . would create a local service system of unprecedented size with route mileage extending close to 5,000 miles . . ." (Rec. 486). The Board has not previously let the unprecedented size of merged airlines interfere with approval of such mergers. In the *Arizona-Monarch Case*, *supra*, it created a local service carrier (Frontier Airlines) of un-

precedented size. Frontier became the largest local service carrier in the country. Every time Frontier is granted a new route is achieves unprecedented size, yet the Board expresses no hesitancy in granting it additional routes. *Service to Phoenix Case,* Docket No. 6247, Order No. E-11833 (1957); *Williston Basin Area Case,* 18 CAB 873 (1954).

Recently, in the *Seven States Area Investigation,* Docket No. 7454, Order No. E-13254, dated December 8, 1958, the Board increased the route miles served by three carriers, Frontier, Ozark and North Central, so that they now exceed 5,000 route miles. Each of these three carriers, by virtue of the decision in the *Seven States Case,* is now certificated to serve unduplicated route miles equal to more than the combined route mileage served by North Central and Lake Central at the time exhibits were first submitted in this case in September of 1955 or at the time of the decision in this case in July of 1957. Why is the creation of local service carriers of unprecedented sizes in area cases and route certification cases in the public interest, whereas such creation is contrary to the public interest in acquisition cases? Why is Frontier allowed to maintain its status as the largest local service carrier in terms of route miles while North Central is denied authority to acquire Lake Central because the combined systems would comprise more route miles than our largest local service carrier (Orig. Tr. 4275, 4276)? Since the Board has not endeavored to answer these questions and explain its inconsistencies, its findings are insufficient. As already suggested, the reasons given by the Board were not only inconsistent with its prior determinations, but are fundamentally inconsistent with each other. The finding that North Central and Lake Central do not serve complementary trade areas makes ludicrous the conclusion that there would be a tendency, if the acquisition were approved, to concentrate on the long-haul traffic. Moreover, the Board has already imposed a mul-

titude of restrictions in North Central's and Lake Central's certificates to prevent just such situations and to insure the protection of local service.

The U. S. Court of Appeals for the District of Columbia has itself condemned inconsistent action by administrative tribunals. *Hall, et al.* v. *FCC*, 99 U.S.App.D.C. 86, 237 F.2d 567 (1956); *McKay* v. *Wahlenmaier*, 96 U.S. App.D.C. 313, 226 F.2d 35 (1955). Yet in this case it disregarded its own precedents and sanctioned the Board's unexplained departure from prior norms without citing a single authority in support of its action. It said (Rec. 566):

> "We think that the judgment of the Board in this case was not arbitrary and was not a departure from established norms which would have bound it."

Basically, the Court is condoning the improper activity of the Board and attributing it to administrative discretion. But it was impossible for the Court to determine whether the Board was exercising valid administrative discretion because the Board did not explain its inconsistency. The Board's findings were insufficient to allow the Court to properly perform its task of judicial review.

Furthermore, the Court's findings on this point were vague, indecisive and inconsistent. It admits that the Board is bound by prior norms, but inconsistently holds that the agency's discretionary powers, or "judgment," are so broad as to permit it to make unexplained departures from these norms. It allows that the Courts must insure that agencies stay "within the bounds of reason and outside the realm of caprice," yet it does not require that the Board state sufficient "reasons" for its inconsistent action here. It is impossible for petitioner to determine just what the Court is holding when it seeks to bind the Civil Aeronautics Board on prior precedents yet sustains an unexplained departure on the grounds of discretion.

Obviously the lower Court feels that there should be some explanation for the Board's inconsistent action because it attempts to supply lame reasons of its own. It says (Rec. 565) that the Board is entitled to depart from its prior norms with regard to "size" of the merged systems because "size" is a relative term and its importance depends upon the "circumstances." It is these "circumstances" which petitioner seeks to discover. If the Board explains these "circumstances" it has explained its departure from prior norms. If the circumstances are the same in both cases then the Board's action is arbitrary and should be reversed.

The Court goes on to say (Rec. 566) that North Central has not accurately assayed the holding of the Board in the *Arizona-Monarch Merger Case, supra.* It says that the *Arizona-Monarch Case* stands for the proposition that "a merger need not have the effect of increasing the intra-system long hauls." Mergers deal with inter-area problems and certainly would have no effect whatsoever on "intra-system long hauls." Furthermore, "feeder" carriers are limited by the conditions of their certificates to the provision of short haul local service. We submit that it is the Court and not petitioner who has not "accurately assayed" the holding of the *Arizona-Monarch Case.* Moreover, no attempt was made to explain the findings of the Board in the *West Coast-Empire Case, supra,* which also support North Central's contention.

The Court said the Board rested its decision in the *Arizona-Monarch Case, supra,* on other circumstances than the finding that the routes of the companies were not complementary. However, as we assay the decision, the Board said that whether or not the routes are complementary is irrelevant. The Board has therefore based its decision here on a consideration previously held in the *Arizona-Monarch* and *West Coast-Empire Cases, su-*

pra, to be irrelevant. When the other basic finding of "unprecedented size" is found inconsistent with other decisions set forth *supra*, it is evident that both primary reasons for the Board's decision are based on findings previously decided to be irrelevant.

Even if there were other circumstances sufficient to invoke the proper use of discretion in the *Arizona-Monarch* and *West Coast-Empire Cases*, no such circumstances existed here. There was no good reason given which would distinguish the prior inconsistent Board actions. Both primary findings supporting the Board's decision had been previously found irrelevant in considering consistency with the public interest.

As a practical matter, the Court of Appeals affirmed the decision of the Board when it did not have sufficient findings before it to permit it to properly perform its task of judicial review.

The question of how much effect should be given to prior administrative decisions and actions is an ill-defined one. This case represents an excellent opportunity for the Supreme Court to add substance to its pronouncements in the *Secretary of Agriculture Case*, *supra*, that unexplained departures from prior norms constitute insufficient findings. Such a decision by the Court would be invaluable as a guide for all administrative agencies and for the litigants that appear before them.

CONCLUSION

WHEREFORE, petitioner prays that a writ of certiorari may issue under the seal of this Honorable Court in this cause directed to the United States Court of Appeals for the District of Columbia Circuit, and upon such review the judgment of said Court of Appeals for the District of Columbia Circuit be vacated, reversed and set aside, and that this case be remanded to said Court with

instructions to proceed further in accordance with the views of this Court.

A. L. WHEELER
1200 Sheraton Building
711 14th Street, N. W.
Washington 5, D. C.
Attorney for Petitioner

Dated: April 28, 1959

PROOF OF SERVICE

I, Asher Louis Wheeler, the attorney for North Central Airlines, Inc., the petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 29th day of April, 1959, I served copies of the foregoing Petition for Certiorari to the Supreme Court of the United States on the several parties thereto as follows:

1. On the United States, by leaving a copy thereof at the office of O. D. Ozment, Esq., Assistant General Counsel, Litigation and Research, for the Civil Aeronautics Board, at Room 906 of the Universal Building, Washington, D. C., and by mailing a copy in a duly addressed envelope, with first class postage prepaid, to the Solicitor General, Department of Justice, Washington 25, D. C.;

2. On the Civil Aeronautics Board, by mailing a copy, in a duly addressed envelope, with first class postage prepaid, to Franklin M. Stone, Esq., its General Counsel, at the offices of the Board, Washington, D. C.;

3. On the Lake Central Airlines Employee Stockholder Group, and Lake Central Airlines, Inc., intervening re-

spondents, by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record as follows:

Albert F. Grisard, Esq.
412 Metropolitan Bank Building
Washington 5, D.C.

Attorney for the Lake Central Employees Stockholder Group

James L. Highsaw, Jr., Esq.
Mulholland, Robie & Hickey
Tower Building
Washington, D. C.

Attorney for Lake Central Airlines, Inc.

/s/ Asher Louis Wheeler
ASHER LOUIS WHEELER
1200 Sheraton Building
Washington 5, D. C.

Attorney for North Central Airlines, Inc.

April 28, 1959

APPENDIX A

CONSTITUTION OF THE UNITED STATES, AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FEDERAL ADMINISTRATIVE PROCEDURE ACT

SEC. 5. [5 U.S.C. § 1004]. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing,

* * * *

(b) *Procedure.*—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8.

* * * *

SEC. 7. [5 U.S.C. § 1006]. * * *

(c) *Evidence.*—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy

provide for the exclusion of irrevelant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of facts.

* * * * *

SEC. 8.. [5 U.S.C. § 1007]. In cases in which a hearing is required to be conducted in conformity with section 7—

* * * * *

(b) *Submittals and decisions.*—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

* * * * *

SEC. 10. [5 U.S.C. § 1009]. • • •

(e) *Scope of review.*—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of any agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

• • • •

CIVIL AERONAUTICS ACT OF 1938

SEC. 2. [25 Stat. 980, 49 U.S.C. 402] In the exercise and performance of its powers and duties under this Act, the Authority shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety; and

(f) The encouragement and development of civil aeronautics.

* * * * *

SEC. 401. [52 Stat. 987, as amended by 56 Stat. 265, 61 Stat. 449, 49 U.S.C. 481]

* * * * *

(d)(1) The Authority [Board] shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Authority [Board] hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

(2) In the case of an application for a certificate to engage in temporary air transportation, the Authority [Board] may issue a certificate authorizing the whole or

any part thereof for such limited periods as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform such transportation and to conform to the provisions of this Act and the rules, regulations, and requirements of the Authority [Board] hereunder.

• • • • •

(i) No certificate may be transferred unless such transfer is approved by the Authority [Board] as being consistent with the public interest.

• • • • •

SEC. 408. [52 Stat. 1001, 49 U.S.C. 488]

• • • • •

(b) Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Authority [Board], and thereupon the Authority [Board] shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Authority [Board] finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order, approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe:

• • • • •

SEC. 409 [52 Stat. 1002, 49 U.S.C. 489] (a) After one hundred and eighty days after the effective date of this section, it shall be unlawful, unless such relation-

ship shall have been approved by order of the Authority [Board] upon due showing, in the form and manner prescribed by the Authority [Board], that the public interest will not be adversely affected thereby—

(1) For any air carrier to have and retain an officer or director who is an officer, director, or member, or who as a stockholder holds a controlling interest, in any other person who is a common carrier or is engaged in any phase of aeronautics.

(2) For any air carrier, knowingly and willfully, to have and retain an officer or director who has a representative or nominee who represents such officer or director as an officer, director, or member, or as a stockholder holding a controlling interest, in any other person who is a common carrier or is engaged in any phase of aeronautics.

(3) For any person who is an officer or director of an air carrier to hold the position of officer, director, or member, or to be a stockholder holding a controlling interest, or to have a representative or nominee who represents such person as an officer, director, or member, or as a stockholder holding a controlling interest, in any other person who is a common carrier or is engaged in any phase of aeronautics.

(4) For any air carrier to have and retain as officer or director who is an officer, director, or member, or who as a stockholder holds a controlling interest, in any person whose principal business, in purpose or in fact, is the holding of stock in, or control of, any other person engaged in any phase of aeronautics.

(5) For any air carrier, knowingly and willfully, to have and retain an officer or director who has a representative or nominee who represents such officer or director as an officer, director, or member or as a stockholder holding a controlling interest, in any person whose

principal business, in purpose or in fact, is the holding of stock in, or control of, any other person engaged in any phase of aeronautics.

(6) For any person who is an officer or director of an air carrier to hold the position of officer, director, or member, or to be a stockholder holding a controlling interest, or to have a representative or nominee who represents such person as an officer, director, or member, or as a stockholder holding a controlling interest, in any person whose principal business, in purpose or in fact, is the holding of stock in, or control of, any other person engaged in any phase of aeronautics.

* * * *

PROCEDURAL REGULATIONS

Principles of Practice of the Civil Aeronautics Board

§ 300.0 *Applicability of part.* The principles of practice set out herein to the extent applicable shall govern the relationship between the Board, its staff, and all other persons.

§ 300.1 *Judicial standards of practice.* In many respects the functions of the Board are similar to those of a court and parties to cases before it and those who represent such parties are expected to conduct themselves with honor and dignity. By the same token, the members of the Board, and those of its employees who participate with the Board Members in the determination of cases upon a record, are expected to conduct themselves with the same fidelity to standards of propriety that characterize a court and its staff. The standing and effectiveness of the Board are in direct relation to its observance, that of its staff, and the parties and attorneys appearing before it, of the highest standards of judicial and professional ethics.

§ 300.2 *Hearing cases; improper influence.* It is essential in cases to be determined after notice and hearing and upon a record that the Board's judicial character be recognized and protected. In such cases:

(a) It is improper that there be any private communication on the merits of the case to a member of the Board or its staff or to the examiner in the case by any person, either in private or public life, unless provided for by law.

(b) It is likewise improper that there be any private communication on the merits of the case to a member of the Board or to the examiner in the case by any members of the Board's staff who participate in the hearing as witnesses or as counsel.

(c) It is improper that there be any effort by any person interested in the case to sway the judgment of the Board by attempting to bring pressure or influence to bear upon the members of the Board or its staff, or that such person or any member of the Board's staff, directly or indirectly, give statements to the press or radio, by paid advertisements or otherwise, designed to influence the Board's judgment in the case.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14261

NORTH CENTRAL AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT
LAKE CENTRAL AIRLINES EMPLOYEE STOCKHOLDER GROUP
and LAKE CENTRAL AIRLINES, INC., INTERVENORS

On Petition for Review of an Order of the
Civil Aeronautics Board

Decided January 29, 1959

Mr. A. L. Wheeler and *Mr. Marvin Klitsner* of the bar of the Supreme Court of Appeals of Wisconsin, *pro hac vice*, by special leave of Court, for petitioner. *Mr. Emory N. Ellis, Jr.*, also entered an appearance for petitioner.

Mr. Robert L. Toomey, Attorney, Civil Aeronautics Board, with whom *Mr. Franklin M. Stone*, General Counsel, Civil Aeronautics Board, *Mr. John H. Wanner*, Associate General Counsel, Civil Aeronautics Board, *Mr. O. D. Ozment*, Assistant General Counsel, Litigation and Research, Civil Aeronautics Board, *Mr. Ulrich V. Hoffmann*, Attorney, Civil Aeronautics Board, and *Mr. Daniel M. Friedman*, Attorney, Department of Justice, were on the brief, for respondent. *Mr. Morris Chertkov*, Attorney, Civil Aeronautics Board, also entered an appearance for respondent.

Mr. James L. Highsaw, Jr., with whom *Messrs. Clarence M. Mulholland* and *Edward J. Hickey, Jr.*, were on the brief, for intervenor Lake Central Airlines, Inc.

Mr. Albert F. Grisard was on the brief for intervenor Lake Central Airlines Employee Stockholder Group.

Before PRETTYMAN, Chief Judge, and WILBUR K. MILLER and WASHINGTON, Circuit Judges.

PRETTYMAN, *Chief Judge:* This is an airline acquisition case, here on a petition to review an order of the Civil Aeronautics Board.[1] North Central Airlines, Inc. (which for brevity and clarity we shall call merely "North") sought to acquire a majority of the stock of Lake Central Airlines, Inc. (which we shall call "Lake"). The dispute has been going on for a long time, at least six years, and has many complications and ramifications. We think we need not here go into that background. In September, 1952, North and the stockholders of Lake executed a contract whereby North was to acquire 96 per cent of the stock of Lake. The contract had to be approved by the Civil Aeronautics Board. The Board refused to approve it, and so the case is here.

The key concept in this controversy is "local service" or "feeder service". This is a type of airline operation certificated by the Board upon the "basic principle of fashioning a local service route system on the needs of a given trade area for short-haul and feeder service". The purpose is to provide short-haul services "geared to local needs and maximum development of local traffic" and concentrating the carriers' efforts "on operations in reasonably compact and homogeneous marketing areas." This is a clear and reasonable concept. It is in contradistinction to trunkline service, which operates to carry over long distances with a minimum of stops.

North is certified as a feeder or local service carrier

[1] Sec. 408, Civil Aeronautics Act, 52 STAT. 1001 (1938), as amended, 49 U.S.C.A. § 488.

in the area northwest of Chicago-Detroit. It extends north to the Canadian border and west to Grand Forks-Fargo-Omaha. It has stops at the big cities in the area—such as Milwaukee and Minneapolis-St. Paul—but also at La Crosse, Winona, Clintonville, Ironwood, Thief River Falls, Manitowoc, and many others of like size and character.

Lake is certified as a feeder or local service carrier in the area southeast of Chicago-Detroit. It thus adjoins North on the Chicago-Detroit line. It has stops in the big cities in the area—such as Cleveland, Buffalo and Cincinnati—but also at Erie, Youngstown, Mansfield, Lima, Logansport, Zanesville, Kokomo, Terre Haute, and others of like size and character.

The problem, from the Board's point of view, was whether the combination of these two local feeder services into one operation was inconsistent with the public interest. The Board has long been of the view that the two areas on either side of the Chicago-Detroit line are separate marketing areas and the local traffic requirements are dissimilar. It so decided in 1950 in a case known as the *Parks Investigation Case*.[2] Traffic tends to flow toward and into the big cities—especially Chicago—on feeder services, but not beyond such places on these services. The record in the present case discloses, the Board held, that "the trade centers of Chicago and Detroit serve as a dividing line between the two areas served by North Central and Lake Central, respectively, and that few local travelers proceed beyond these terminals via the local service routes involved." The thrust of the Board's opinion was that the combination of these two areas into one operation, which would then extend from Buffalo-Pittsburg to Grand Forks-Duluth, would violate the whole principle of local or feeder service and would clearly impinge upon trunkline certificates.

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[2] 11 C.A.B. 779.

The Board found, as we have indicated, that there is little inter-area traffic between the two local feeder route services. It found that the combined area would be too big for the sort of concentrated local homogeny desired for local feeder certificates. In the Board's opinion feeder service should be centered in the area to be served and should be soundly integrated for that purpose. In terms of route mileage, number of cities served, density of population, and geographical area covered, the combined carriers would take on characteristics akin to a trunkline carrier and pose a threat to existing trunklines.

The Board said it wanted local feeder carriers to concentrate on local needs and local traffic problems, and it feared that the temptation to woo through traffic over the long distances and between the big cities which would be within the service area of a combined North-Lake operation, would be too insistent to be resisted. The Board found that each of these carriers, North and Lake, is in sizable proportions as a feeder service and each has sufficient room for development in its own area. The Board disagreed emphatically with the examiner in his view that the combination was necessary to preserve Lake, and the Board explained its view in detail, supported by the developing traffic figures.

The Board found that subsidy savings would be effected by the acquisition, if permitted, but that this saving was outweighed by the adverse effects on the overall public interest.

Counsel for North argues that the conclusion of the Board does not follow rationally from the ultimate findings; that the ultimate findings do not flow reasonably from the basic findings; and that the latter are not supported by the evidence as a whole. This is the skillful way of attacking agency orders, being a method of probing each link along the line of agency action. It would unduly prolong this opinion to discuss each of these asserted failures, but we have examined them and think none of them reveals a fatal defect.

The reasoning of the Board seems amply clear. We think the conclusion flows rationally from the ultimate findings, and these in turn rest upon ample basic findings. The latter seem to be supported by ample evidence. Of course there are disputes as to the inferences to be drawn from raw factual data, but it is not our function to draw inferences. Our function is to ascertain whether the inferences drawn by the administrative agency are within the reasonable boundaries prescribed by the facts. We think they are in this case.

With the assistance of supplemental memoranda from counsel for the parties, the court has explored several questions relating to the procedure before the Board, but we find no reversible error in these respects.

North urges that the language of Section 408(b) of the statute raises a presumption in favor of mergers of air carriers. Be that as it may, any such presumption could hardly survive the considered judgment of the Board, as expressed in a case such as the present one, that a particular proposal is not consistent with the public interest.

North says the Board was arbitrary and failed to make sufficient findings when it departed from established norms. For example, North says the proposition that the size of a proposed merged system is immaterial to approval of the merger is an established rule. It refers to a number of cases. But "size" is a relative term, and its importance depends upon circumstances. Because the Board found the size of a merged system immaterial in one case cannot make it an immaterial factor in all cases and under all circumstances. And North says the Board established in the *Arizona-Monarch Merger Case*[3] that feeder routes need not be complementary in order to be merged. It says that in the present case the Board, inconsistently, held the trade areas of the two airlines must be complementary. But we think North does not accurately assay either holding. In *Arizona-Monarch* the

[3] 11 C.A.B. 246 (1950).

Board said that two feeder systems need not be geographically complementary; that is, a merger need not have the effect of increasing the intra-system long hauls. In the present case the Board pointed out, as one feature of the proposed merged system, the lack of inter-area local traffic. But in *Arizona-Monarch* the Board stressed other circumstances. In the instant case the lack of this traffic was one of several critical factors. We find no inconsistency. These problems cannot be solved by a mathematical computation. Judgment necessarily enters into each one, and the Congress has given the agency power to exercise that judgment. As was properly pointed out in the *Southwest-West Coast Merger Case*,[4] the Board is concerned principally with the national air route pattern. This court can and should insure that the agency stays within the bounds of reason and outside the realm of caprice, but the court cannot substitute its own judgment as to what would or would not be inconsistent with the public interest in a proposed merger. We think the judgment of the Board in this case was not arbitrary and was not a departure from established norms which would have bound it.

Affirmed.

[4] 14 C.A.B. 356, 358 (1951).

APPENDIX C

COPY

Law Offices
ALBERT F. GRISARD
412 Metropolitan Bank Building
Washington 5, D. C.

July 29, 1954

Honorable Chan Gurney
Chairman
Civil Aeronautics Board
Washington 25, D. C.

Re: Docket No. 6234

Dear Senator Gurney:

Reference is made to the several conversations Messrs. Gwin Hicks, Lloyd W. Hartman, Robert W. Clifford and the undersigned have had with you and the Members of the Board regarding the acquisition by an employee group of the Weesner stock interest in Lake Central Airlines, Inc. On May 21, 1954, representatives of the employee group and the Weesner family signed a Memorandum of Understanding and Intent, which was subsequently filed with you, setting forth the agreement of the Weesners to grant an option to the employee group for the purchase of the majority stock interest in Lake Central.

As you know, the Weesners through their counsel, Charles S. Murphy, thereafter approached the Board for permission to discuss a sale of the Weesner stock interest to Capitol Airways, Inc., of Nashville, Tennessee. When these negotiations terminated the Weesners then resumed negotiations with the employee group with the result that an option contract was executed on June 25, 1954. Copies of the option contract have been furnished each Member of the Board.

Under such contract, the employee representatives were given 30 days, or until July 25, 1954, to obtain firm com-

mitments from the officers and employees of Lake Central and such other persons as they might designate for the purchase of the entire Weesner stock interest, amounting to 80,954 shares out of 83,039 shares outstanding. These commitments were obtained on July 23, 1954, and written notice thereof given to Mr. Charles S. Murphy on July 26, 1954.

It has been generally understood by the employee representatives that they should make a showing to the Board on or before August 1, 1954, of the existence of (1) the above-mentioned employee stock purchase commitments and (2) commitments from outside sources for the purchase of new securities which would yield the corporation at least $250,000, in order to prevent a dismissal of the show-cause proceeding (Docket No. 6234) for a one-year extension of Lake Central's certificate for Route No. 88. The employee group has made very substantial progress toward obtaining the latter commitments, but has been handicapped in completing the refinancing program by August 1, 1954, because (1) of the time lost while the Weesners explored the proposal of Capitol Airways, Inc., and (2) of the fact that the delay attending the exploration of the Capitol Airways proposal resulted in the employees' refinancing efforts being carried on in a period when many of their investment contacts were vacationing. Under the provisions of the option contract, the employee group has until August 25, 1954, to obtain this necessary additional financing.

Despite these handicaps of short available time and the vacation season, preliminary commitments have already been obtained from businessmen and industries of Mansfield, Lima, Columbus, Toledo and Dayton, Ohio, and active negotiations are now being conducted with similar persons in Indianapolis, Cleveland, Cincinnati, Chicago, Bloomington, Indiana, and Jackson, Michigan. The response has been heartening and the present indications

are that the goal of the refinancing program will be attained within the time allowed by the option contract.

Because of this substantial progress made by the employee group, we respectfully request that the Board defer any further action on Docket No. 6234 or Docket No. 5770 until the refinancing program is completed which, under the terms of the option contract, cannot be later than August 25, 1954. In order that the Members may have a personal, direct knowledge of the progress already made in the brief period since June 25, 1954, we suggest and would welcome the opportunity of an informal meeting next Thursday or Friday (August 5th or 6th) between the Board and representatives of the management and employees of Lake Central. If the Board's schedule does not permit of this joint meeting, it is hoped that Lake Central's representatives may meet with the Members individually on either of such days, at times convenient to the Members.

I shall very much appreciate receiving word from you regarding the foregoing suggestion.

Sincerely yours,

/s/ Albert F. Grisard
Albert F. Grisard
Counsel for Lake Central Airlines, Inc.

Copy: Vice Chairman Harmar D. Denny
Member Oswald Ryan
Member Josh Lee
Member Joseph P. Adams